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Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-

NATHRA NADER AND ALBERT C. SNYDER, JR.,
Appellants.

v.

GLORIA SCHAFFER, Secretary of the State
of Connecticut; DEMOCRATIC PARTY OF
THE STATE OF CONNECTICUT; and RE-
PUBLICAN PARTY OF THE STATE OF
CONNECTICUT,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This appeal raises the question of whether it is constitutionally permissible for a state to refuse to allow duly registered voters to participate in state-run, state-financed, and state-mandated primary elections merely because those voters insist upon remaining independents and refuse as a matter of conscience to join a political party. Because

the issue has never been decided by this Court, because the outcome of the case is of great concern to millions of independent voters throughout the United States and because the District Court deviated significantly from this Court's decisions dealing with the right to vote and ignored certain of this Court's decisions dealing with freedom of association, this Court should note probable jurisdiction and set the case for full briefing and argument.

OPINION BELOW

The opinion of the District Court has not yet been officially reported. It is set forth at pages A-2 and A-26 of the Appendix to this Statement.

JURISDICTION

This action challenges the constitutionality of Conn. Gen. Stat. §9-431 on the ground that its enforcement deprives plaintiffs of their right to vote and their right to freedom of association. Because plaintiffs sought an injunction against enforcement of a state statute, a three-judge court was convened pursuant to 28 U.S.C. §2281. The decision of the court on the merits was handed down on July 14, 1976, and judgment was entered on July 20, 1976, denying plaintiffs' motion for summary judgment and granting defendants' motion to dismiss. (Appendix p. A-1.)¹ A timely notice of appeal was filed in the District Court on August 13, 1976. (App. 27.) This Court has jurisdiction over the appeal under 28 U.S.C. §1253.

¹ Hereinafter, reference to documents printed in the Appendix will be made in the form "App. 1."

STATUTE INVOLVED

The statute challenged by plaintiffs, Section 431 of Title 9 of Connecticut General Statutes, provides in pertinent part:

Eligibility to vote at primary: No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be

QUESTION PRESENTED

Does Conn. Gen. Stat. §9-431 deprive plaintiffs of their constitutional rights by compelling them to choose between exercise of their rights to vote and to associate in support of a candidate on the one hand, and their rights to freedom of association and to privacy of association on the other?

STATEMENT OF THE CASE

A. FACTS

Appellants, the named plaintiffs in this action, are two registered voters from the Town of Winchester, Connecticut. Each refuses, for reasons of personal conviction and principle, to enroll as a member of a political party. As a result, along with 561,936 other independent voters, who constitute 36% of the State's electorate, they are prevented by Connecticut law from voting in the state-run primary elections in which major party candidates for public office are nominated.

Appellant Nader has been a registered voter for more than fifty years and has regularly voted in federal, state and local general elections. (Nader Aff. ¶s 1, 2, App. 28.)² He has never been a member of any political party because such affiliation would violate his beliefs. (Id. ¶3, App. 28.) As a result, he has never been allowed to vote in the primary elections in which major party candidates for public office are nominated and has thus been unable to support fully certain candidates whom he preferred over those candidates who were eventually nominated. (Id. ¶4, App. 28.)

Appellant Snyder was enrolled as a member of the Republican Party for almost 30 years, because it was predominant in the towns in which he lived and because its candidates best expressed his views on issues during those years. (Snyder Aff. ¶3, App. 29.) In 1974, he decided that there was no significant difference between the two major parties. The Watergate scandals also persuaded him that the present political system makes candidates excessively dependent on their parties and unwilling to be independent and honest. Convinced of these facts, he was unwilling to foster the system by continuing enrollment as a party member and decided to become an independent. (Id. ¶4, App. 29-30.) Mr. Snyder believes that he has had "little real choice between candidates" at the general election and that the percentage of voters who do not vote in such elections indicates that other voters share his views. (Id. ¶5, App. 30.) Because of his decision not to enroll, he is unable to support fully certain candidates whom he prefers to those nominated in primaries. (Id. ¶6, App. 30.)

² This citation refers to affidavits made by each plaintiff and filed with plaintiffs' motion for summary judgment.

Plaintiffs are denied the right to participate in the primary selection process by Conn. Gen. Stat. §9-431, which provides that only voters who are on a party's enrollment list may vote in that party's primaries. In order to appear on that list, a registered voter need only inform the registrar of voters that he wants to join a particular party. §9-56. No ideological test or loyalty oath is administered. The registrar then compiles lists of the members of each party, which are made "available for public use" and are distributed to party leaders and to each candidate for nomination. §9-55. Enrollment is thus an affirmative, public act of affiliation with a political party.

A previously unaffiliated voter is immediately entitled to "the privileges of party enrollment," with the exceptions that he may not vote in a primary if he enrolls after the third Saturday before a primary, and he may not participate in a party caucus or convention if he enrolls on the day of the caucus or convention. §9-56. A voter who has been previously affiliated with one party and who wishes to be placed on the enrollment list of another may transfer simply by filing papers requesting the change with the registrar, but he may not vote in a primary or in a party caucus until six months from the date of his application. §9-59; see §9-56.

The primary in which enrolled party members are permitted to vote is not merely a private casting of preferences but is financed and regulated by the State. The State provides the machines and the polling places (§9-436; see §§9-239, 9-240) and sets the date for the election. §9-423. It prescribes the procedures to be used, the officials who must supervise, and the methods of resolving disputes and preventing fraud. §§9-431 to 9-450. Defendant Secretary of State supervises the enforcement

of these statutes and of other sections of the State's election law. §§9-3, 9-4, 9-5; Title 9, Ch. 153, *passim*.

The State also regulates in detail almost every aspect of the major parties' nominating procedures leading up to the primary elections. It requires the major parties to hold conventions at which "party-endorsed" candidates for state and district offices are selected,³ and prescribes the procedures for delegate selection, for roll calls, and for the tallying and reporting of final results. *Id.* §§9-382 to 9-388, 9-407, 9-408, 9-424. Equally important, it is the State which decides whether the primary elections from which appellants are barred will take place at all, since §§9-399 to 9-415 establish the conditions which must be met before another member of the party may challenge the party-endorsed candidate in a primary election. If no candidate for a particular office fulfills these requirements, no primary is held, and the name of the party endorsee is placed on the general election ballot. If one or more candidates succeeds, a primary is held, and the winner's name is placed on the general election ballot. *Id.* §§9-382, 9-415, 9-416.

B. PROCEEDINGS IN THE DISTRICT COURT

On January 15, 1976, appellants filed suit in the United States District Court for the District of Connecticut on behalf of themselves and a class comprised of

³ "State or district offices" are those whose constituency is larger than a single town. See §§9-372(d), 9-372(m). Candidates for "municipal office" are chosen by somewhat different procedures, but primaries for those offices are held on the same day and under the same general rules as the primaries for state and district offices. See §§9-372(g), 9-390, 9-423.

"all registered voters in the State of Connecticut who are not enrolled in any political party and are therefore barred from voting in primary elections." Complaint ¶6. The Secretary of the State of Connecticut, who is Commissioner of Elections of the State *ex officio*, was named as defendant.

The complaint alleged that the enforcement of Conn. Gen. Stat. §9-431 by defendant and her agents deprived the members of the plaintiff class of fundamental constitutional rights, in violation of 42 U.S.C. §1983. Specifically, it alleged that by preventing members of the plaintiff class from voting in primary elections, while allowing party members to vote, defendant deprived the members of the plaintiff class of equal protection. As an alternative basis, the complaint alleged that defendant's conduct impermissibly compelled the members of the plaintiff class to choose between the exercise of two constitutional rights, the right to vote and the right to freedom of association.

The complaint asked the District Court to enjoin defendant from enforcing the statute insofar as it prohibits the members of the plaintiff class from voting in primary elections and to require defendant to instruct local election officials to allow each member of the plaintiff class to vote in a primary election of his or her choice. It also asked the court to certify the action as a class action and to convene a three-judge court under 28 U.S.C. §§2281 and 2284 to consider plaintiffs' claims. A motion to convene a three-judge court was filed with the complaint, and on March 23, 1976, Chief Judge Kaufman of the Second Circuit issued an order to convene a court composed of Circuit Judge Anderson, Chief District Judge Clarie and District Judge Blumenfeld.

In the interim, defendant had answered the complaint and had moved under Fed. R. Civ. P. 19 to add the two major parties in the State of Connecticut and certain local election officials as defendants. Thereafter, the Court granted the motion to the extent of requiring joinder of the major parties, and on April 13, 1976, plaintiffs filed an amended complaint adding the State Republican and Democratic Parties as defendants.⁴

Since there were no disputed issues of fact, plaintiffs moved for summary judgment, defendants filed motions to dismiss, and a hearing was held on May 11, 1976, before the three-judge panel. On June 22, 1976, United States Senator Lowell P. Weicker, Jr. of Connecticut filed an *amicus curiae* brief in support of plaintiffs' claims, and on June 30, plaintiffs filed a supplemental memorandum apprising the District Court of this Court's decision in *Elrod v. Burns*, ___ U.S. ___, 45 U.S.L.W. 5091 (June 28, 1976).

C. THE DECISION OF THE THREE-JUDGE COURT

On July 14, 1976, the District Court filed its Memorandum of Decision, denying plaintiffs the relief they sought and granting defendants' motion to dismiss the complaint, concluding that "§9-431 is reasonably related

⁴ On March 12, 1976, plaintiffs filed a motion to certify the class, which was opposed by defendants. At the argument on the merits, defendant Secretary of State agreed that if plaintiffs were successful in their claims, she would extend the relief ordered for plaintiffs to all members of the plaintiff class. Consequently, plaintiffs agreed to withdraw their motion for certification of the class. See Memorandum of Decision ("Mem. Dec.") at App. 24-25 n. 2.

to the accomplishment of legitimate state goals." (Mem. Dec. at App. 21.) In reaching that result, the Court very briefly considered some, but not all, of plaintiffs' principal arguments, but devoted most of its discussion to the interests of the two major parties and the reasons why the State might have an interest in protecting the parties.

Thus, plaintiffs had argued that enforcement of the Connecticut statute violated this Court's holding in *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), by requiring independent voters to sacrifice enjoyment of certain fundamental constitutional rights — their rights to vote and to associate freely in support of candidates of their choice — in order to enjoy others — their rights to freedom of political association and to privacy of association. To establish the first part of that argument, they relied on the line of cases beginning with *Cipriano v. Houma*, 395 U.S. 701, 706 (1969), and *Kramer v. Union Free School District*, 395 U.S. 621, 632-33 (1969), which hold that total exclusion of a class of voters who are substantially interested in or affected by the results of an election can be justified only by a "compelling" state interest.⁵ Plaintiffs had also argued that their right to associate fully in support of particular candidates, recognized most recently in this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), was infringed when plaintiffs were denied the right to cast a ballot for those candidates. See *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973).

⁵ The District Court accepted plaintiffs' arguments that plaintiffs were interested in and affected by the results of the primary elections, and that in general constitutional principles relating to the right to vote apply in the primary election context. (Mem. Dec. at App. 19, 25 n. 4.)

In order to enjoy these rights, plaintiffs had argued, they are forced by the Connecticut statute to surrender other constitutional rights of overriding importance to them. Most notably, the statute coerces them into an unwanted affiliation with a political party, in violation of their right to freedom of association. *Elrod v. Burns*, *supra*; see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Moreover, because lists of enrolled voters are made public, their right to privacy of association would be infringed if they succumbed to the requirements of the statute in order to obtain their right to vote.

Despite the fact that these arguments were set forth in considerable detail in the plaintiffs' memoranda and in the *amicus* brief filed by Senator Weicker, the District Court afforded them only the briefest consideration in its 27-page opinion. With regard to the right to vote, the Court held that plaintiffs' exclusion was proper because plaintiffs did not share an interest which the Court presumed — without the slightest evidentiary support — that party members had in selecting a candidate who could win "while remaining most faithful to party policies and philosophies." (Mem. Dec. at App. 19.) As to plaintiffs' right to associate in support of particular candidates, the Court observed that plaintiffs remained free to contribute time and money to major party candidates of their choice and to choose to support other candidates selected through "alternate avenues of political activity." (Mem. Dec. at App. 6.)

In response to plaintiffs' arguments concerning their right not to be coerced into unwanted affiliation, the Court ignored *Elrod* and concluded that since party

enrollment "imposes absolutely no affirmative party obligations on the voter in terms of time or money," no constitutional right was infringed by the statute. (See Mem. Dec. at App. 8-9.) It held further that privacy of association was protectable only when an individual suffers harassment because of his associations and that plaintiffs had failed to demonstrate such harassment. (Mem. Dec. at App. 9-10.) Finally, the Court never considered the substance of plaintiffs' argument, based on *Dunn*, that the statute imposed an impermissible choice on independent voters. Instead, the Court distinguished *Dunn* on the ground that enrolling with a party is not "beyond the capabilities or powers of an elector to perform." (Mem. Dec. at App. 16.)

The bulk of the District Court's opinion was concerned with the powers and rights of the major political parties. The Court asserted, without factual support, that the present dominant position enjoyed by these two parties is in no way attributable to favors tendered by the State, but is caused by the parties' "success," over time, "in attracting the bulk of the electorate." This "[s]uccess" . . . does not necessarily call for strict constitutional scrutiny by the judiciary." (Mem. Dec. at App. 7.)

The Court stated further that each party is a "voluntary association," whose goal is to effect "the will of its members" by achieving office and implementing "its policies and philosophies." It therefore "seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its members) policies and philosophies." (Mem. Dec. at App. 10-11.) Relying primarily on *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975), the Court asserted that party members enjoy a constitutional right

of association which "may to some extent offset the importance of claimed conflicting rights asserted by persons challenging some aspect of the candidate selection process." (Id. at App. 11.) It stated that the State has an obligation to provide "affirmative protection" to these associational rights and, under *Ray v. Blair*, 343 U.S. 214, 221-22 (1952), to shield the political parties from "intrusion by those with adverse political principles." (Mem. Dec. at App. 11-12.) In so ruling, the Court rejected the distinction offered by plaintiffs between an interest in ensuring the loyalty of candidates for public office and an interest in ensuring the loyalty of rank and file party members. (Id. at 13-14.)

The District Court also held that the State's interest in "protecting the overall integrity of the historical electoral process" is advanced by Conn. Gen. Stat. §9-431, in two ways. First, the statute enables the State to preserve the parties "as viable and identifiable interest groups," so that the electorate may use party labels to identify the ideological position of candidates in the general election. Second, it enables the State to prevent "fraudulent and deceptive conduct." (Mem. Dec. at App. 12.) In the Court's view, such conduct includes not only "raiding," which involves an attempt by the partisans of one party intentionally to distort the results of another party's primary, but also the very act of voting in a primary if one is not a member of that party. (Id. at App. 15.)

With regard to raiding, plaintiffs had argued that independent voters were by definition unlikely raiders and that the fact that the state allowed independents to enroll with a party within three weeks of a primary and one day of a caucus, while requiring party members to wait six months, indicated that the purpose of the statute was

not to deter raiding. The Court rejected this argument on the ground that the legislature had determined that the three week period "is sufficient to demonstrate that a previously independent voter will not, in voting, engage in disruptive or deceptive conduct" (Id. at App. 16.)

Finally, despite plaintiffs' extensive arguments, based on the decisions of this Court, that their fundamental constitutional rights were totally denied by enforcement of the Connecticut statute, the Court refused to apply strict scrutiny. Instead, noting that "incidental" or "minimal" burdens on the exercise of constitutional rights need not be justified by "compelling" state interests, the Court held that the statute satisfied the less rigorous "rational relationship" test. (Id. at App. 20-21.)

THE QUESTION PRESENTED IS SUBSTANTIAL AND REQUIRES PLENARY CONSIDERATION BY THIS COURT

In this case, two independent voters assert that section 9-431, which permits only members of political parties to vote in primary elections, deprives them of the power to exercise fully certain fundamental rights protected by the Constitution. The question presented is substantial, not only because a controversy involving the exercise of basic individual rights lies unresolved by this Court, but also because independent voters now play an increasingly important role in American politics. The District Court's failure to confront the arguments made by plaintiffs, and to analyze carefully and realistically the nature of the parties and their relationship with the State, leaves the full dimensions of this question unexplored.

Therefore, the Court should set this case down for full briefing and argument on the merits.

I. THE RIGHT OF INDEPENDENT VOTERS TO PARTICIPATE IN STATE-RUN PRIMARY ELECTIONS HAS NEVER BEEN CONSIDERED BY THIS COURT AND IS OF WIDE SIGNIFICANCE.

The issue raised by this case has never been presented to this Court, let alone resolved by it after plenary consideration. Although this Court has often answered related questions, its opinions do not preclude this suit. In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court considered only the effect of durational enrollment requirements on the constitutional rights of registered voters who wished to enroll with political parties. Neither case concerned the rights of independent voters, who steadfastly refuse to associate with a political party. In cases like *Storer v. Brown*, 415 U.S. 724 (1974), *American Party of Texas v. White*, 415 U.S. 767 (1974), and *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court has considered the rights of independent candidates and their supporters. But the independent voters who are suing here have no connection with or interest in independent candidates and therefore the holdings of those cases are inapposite to this case.

Two factors militate in favor of this Court's giving plenary consideration to plaintiffs' claims. The first is that independent voters now play an increasingly important part in electoral politics. For various reasons, most notably because of the political events of the past ten years, their ranks have steadily grown until now 36% of the electorate in Connecticut and 38% across the country

term themselves independents.⁶ Nationwide, more than 45% of the voters under 30 years of age are independents.⁷ Two characteristics mark this segment of the electorate. First, the attributes of contemporary independent voters indicate that they are more sophisticated politically than the independent voters of earlier years. "They reject the party system consciously as a response to political events, while remaining interested and continuing to vote. . . . [T]he new independence has emerged among the young, well educated, professional voters largely as a response to issues."⁸ Second, because of this sophistication, and because voters' political attitudes toward the parties are adopted early in life and become more fixed over time, these voters are unlikely to surrender their independence for partisanship.⁹ Thus, the voters most directly affected by the results of this suit represent a large, distinct group likely to have a continuing influence on the shape of American politics.

⁶ The figure for Connecticut is derived from statistics compiled by the Secretary of State. The nationwide figure reflects voter affiliation as of 1974 and is taken from data compiled by the Survey Research Center for Political Studies at the University of Michigan. These studies are analyzed in N. Nie, S. Verba & J. Petrocik, *The Changing American Voter* 49 (Harv. Univ. Press 1976) (hereafter "Nie"), a comprehensive new study of voting behavior. A similar figure is reported in K. Mulcahy & R. Katz, *America Votes* 46 (Prentice-Hall 1976) (hereafter "Mulcahy"), whose data were compiled by the Inter-University Consortium for Political Research.

⁷ See Nie at 63; Mulcahy at 46.

⁸ Mulcahy at 48; see Nie at 94-95.

⁹ See Mulcahy at 48; Nie at 94-95.

The second factor compelling consideration is that the right denied these plaintiffs is perhaps the most basic one enjoyed by citizens of a democracy. As a matter of simple fairness, individuals should not be excluded from participation in an integral stage of the process by which their representatives and executives are chosen and should not be forced to accept the choices made by their neighbors on so important a matter absent the most compelling of justifications. At a time when increasing numbers of the electorate are dissatisfied with existing institutions, including the major political parties, and when fewer and fewer people vote at all, those who seek to participate should not be denied that right without careful examination of their claims and of the basis for the justifications for exclusion advanced by the State.¹⁰

II. THE CLAIMS MADE BY PLAINTIFFS INVOLVE FUNDAMENTAL RIGHTS TO WHICH THE DISTRICT COURT GAVE INADEQUATE CONSIDERATION AND THIS COURT SHOULD RESOLVE THOSE CLAIMS ONLY AFTER FULL BRIEFING AND ARGUMENT.

Plaintiffs' principal argument is that section 9-431 forces them to choose between exercise of their fundamental rights to vote and to associate in support of particular candidates on the one hand, and exercise of their fundamental rights to be free of coerced affiliation and to

¹⁰ Dissatisfaction with existing institutions, including the parties, is described in Nie at 277-80 and in Mulcahy at 5-7; the same point was emphasized in the brief filed by Senator Weicker below. Brief of Amicus Curiae at 2, 9-10. For documentation of the decrease in participation in elections, see Nie at 272-76; W. Schneider & D. Yergin, "What If They gave an Election and Nobody Came?" *New Times* 25, 33 (October 1, 1976).

maintain their privacy of association on the other. Imposition of this choice violates the principle set out in *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972), where this Court held that the State may not require its citizens to forego exercise of one fundamental constitutional right in order to enjoy another, unless it has a "compelling" reason to justify its action.

The District Court never dealt with this argument. Although plaintiffs are totally excluded from the franchise in a state-run election, the Court refused to recognize any infringement of plaintiffs' right to vote. Moreover, despite this Court's recent decision in *Elrod v. Burns*, ___ U.S. ___, 45 U.S.L.W. 5091 (June 28, 1976), the Court also found that plaintiffs had no right not to be coerced into unwanted affiliation. Although deprivation of either of these rights requires strict scrutiny under precedents set by this Court,¹¹ the court below erroneously applied a test which is appropriate only when the exercise of constitutional rights remains unimpaired or, at most, is only slightly burdened, and found that it was met for reasons which do not withstand analysis.

A. The prior decisions of this Court clearly indicate that the total exclusion of these plaintiffs from participation in primary elections infringes their right to vote. In a long line of cases, this Court has held that under the equal protection clause of the Fourteenth Amendment, every citizen enjoys a fundamental right to vote, equal to that of other citizens. E.g., *Reynolds v. Sims*, 377 U.S. 533 (1964). A number of decisions have recognized that the reach of the equal protection clause extends to

¹¹ See note 13, *infra*.

the right to vote in a primary. *Rosario v. Rockefeller*, *supra*; *Bullock v. Carter*, 405 U.S. 134 (1972); *Gray v. Sanders*, 372 U.S. 368 (1963). One of the basic principles articulated by this Court in protecting the right to vote is that once the State has provided for popular election, it may not exclude from the franchise voters "who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote." *Cipriano v. Houma*, 395 U.S. 701, 706 (1969); *accord*, *Hill v. Stone*, 421 U.S. 289, 295-98 (1975); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 207-13 (1970); *Kramer v. Union Free School District*, 395 U.S. 621, 632-33 (1969).¹² All voters are affected in much the same way by the results of the major parties' primary elections since the choice presented to everyone in the general election is significantly narrowed. In addition, because of the dominance enjoyed by the two major parties, one of the two individuals selected is likely to be the voter's next elected official.

Prior decisions of this Court make it equally clear that plaintiffs also enjoy a right to associate in support of a particular candidate and that full enjoyment of this right is denied them by section 9-431. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the Federal

¹² These and the other cases cited above demonstrate the impropriety of the suggestion made by the District Court at the end of its opinion that plaintiffs' attempt to vindicate their rights in a judicial forum was inappropriate and that they and other independent voters should restrict themselves to electing "one or more representatives in the legislature" to alter the election laws. (Mem. Dec. at App. 24.) A significant number of this Court's decisions bear witness to the fact that an individual may seek judicial review of a state statute that infringes his voting rights or other political rights, and that the Court was in error in suggesting the contrary.

Election Campaign Act's limitation on contributions to candidates, despite the fact that the limitation burdened "one important means of associating with a candidate." *Id.* at 22. By contrast to the ability to contribute money freely, which this Court viewed as a "narrow aspect of political association," *id.* at 28, the ability to vote for a candidate must be considered a central aspect of associational rights in light of *Kusper v. Pontikes*, *supra*, where a statute requiring a voter to skip one year's primaries as a price to pay to switch her affiliation to another party was held to have violated her right to freedom of association. 414 U.S. at 58. By denying plaintiffs here the right to vote for particular candidates in primary elections, the State severely curtails their right to associate fully in support of those candidates.

The District Court's response to this argument consisted of two related observations, neither of which justifies the infringement of plaintiffs' rights. First, the Court noted that independents remain free to contribute time and money to candidates of their choice, but it failed to acknowledge that the same "freedom" existed in *Kusper* and was found insufficient to sustain the statute. 414 U.S. at 58. The District Court also observed that plaintiffs may support candidates selected by minor parties or through petitions. Aside from the fact that independents may have absolutely no interest in associating in support of such candidates, it should be noted that under Connecticut law, *all* voters, including party members who vote in primaries, may participate in these alternate ways of selecting candidates. Conn. Gen. Stat. §9-451d. To require independent voters to support such efforts or none at all, while allowing party members wider choice of political activity, is to deny independents equal protection.

The District Court's opinion was equally inadequate in its treatment of plaintiffs' right not to be coerced into unwanted association. This right has most recently been recognized in *Elrod v. Burns, supra*, where this Court held that state officials may not condition retention of public employment on affiliation with a political party. In considering this issue, the District Court failed to mention *Elrod* and concluded without detailed analysis that the coercion of affiliation here was "simply not comparable" to other types of improper coercion of belief. The sole reason given by the Court for its holding was that the political parties impose no affirmative obligations in terms of time or money on enrolled party members. (Mem. Dec. at App. 8-9.)

Mr. Justice Brennan's plurality opinion in *Elrod* makes clear the principle that coercion of allegiance itself, quite apart from any practical obligations imposed by the party, violates an individual's rights. "Even a pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs." *Id.* at 5094. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Affidavits filed by plaintiffs in this case establish that each plaintiff's refusal to join a political party is based on firm personal conviction and political belief. (App. 28-30.) The District Court's holding indicates its lack of appreciation for the importance of these convictions and beliefs.

A similar lack of understanding is reflected in the Court's holding that plaintiffs could not claim violation of their right to privacy of association because they had not demonstrated "actual threats or incidents of harassment." It is apparent that the reason plaintiffs do not now suffer harassment as a result of affiliation with a party

is that they do not belong to a party. Faced with the impermissible choice between their right of privacy and other constitutional rights, plaintiffs chose to preserve their privacy by not affiliating. In addition, whether or not plaintiffs or other voters might suffer harassment by virtue of party membership, opinions of this Court recognize that privacy of association and other forms of privacy of belief have an inherent value that warrants constitutional protection. See *Buckley v. Valeo, supra*, 424 U.S. at 64-66; *id.* at 237-38 (Burger, C.J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); *Talley v. California*, 362 U.S. 60, 64 (1960). If plaintiffs did succumb to the statute and swear an allegiance they do not feel, there can be little doubt that publication of a list identifying them with a particular party would invade their privacy.

By requiring plaintiffs either to affiliate with a party or to forego voting in primary elections, section 9-431 forces them to choose between exercise of their fundamental rights to be free of coerced association and to maintain their privacy of association on the one hand, and their fundamental rights to vote and to associate in support of candidates on the other. This choice is impermissible under the holding of *Dunn v. Blumstein, supra*, where this Court invalidated one-year residency requirement for voting because it forced an individual to choose between exercise of two fundamental rights. The District Court sought to distinguish *Dunn* on the ground that enrolling with a party is not "beyond the capabilities or powers of an elector to perform," thereby implying that plaintiffs here have a power to retain their full rights not shared by the plaintiff in *Dunn*. (Mem. Dec. at App. 16.) This view misconstrues *Dunn*. Professor

Blumstein was capable of retaining either, but not both, of his rights. He was free to exercise an uninterrupted right to vote by not moving; if he moved to Tennessee, enjoying his right to travel, the Tennessee statute required him to surrender temporarily his right to vote. This Court held that the state could not impose this choice without a "compelling" reason. 405 U.S. at 342. This case is precisely analogous to *Dunn*. Plaintiffs can exercise their right to vote if they are willing to be coerced into joining a political party. Indeed, many voters who would prefer to be independents may have already made this choice. Plaintiffs, on the other hand, along with many other voters, have chosen to maintain their independence and as a result have been denied their voting rights. It is precisely this kind of "choice" which was struck down in *Dunn* and which the District Court erroneously permitted here.

B. Despite the fact that the impermissible choice imposed on appellants by section 9-431 undeniably deprives them of the power to exercise two fundamental rights, the District Court refused to subject the statute to the exacting scrutiny required under the holdings of this Court.¹³ Instead, finding the infringement of appellants' rights "minimal" at most, the District Court held the statute adequate

¹³ The test used in *Dunn*, which appellants contend is appropriate here, requires the State to demonstrate that its statute furthers a "compelling" state interest by the least drastic available means. 405 U.S. at 342-43. This or a similar test would be required even if the statute did not force appellants to choose between fundamental rights, but merely conditioned exercise of either right on the surrender of another interest of non-constitutional dimension. *Elrod v. Burns*, *supra*, 45 U.S.L.W. at 5096 (freedom of association); *Hill v. Stone*, *supra*, 421 U.S. at 297-98 (right to vote); *see Buckley v. Valeo*, *supra*, 424 U.S. at 25 (right to associate with candidates); *id.* at 64-65 (privacy of association).

as promoting "legitimate state goals." (Mem. Dec. at App. 21.) In describing the goals which it held to be "legitimate," the District Court gave undue weight to the arguments advanced by appellees because it failed to recognize a number of crucial distinctions argued by appellants. Initially, it failed to confront appellants' argument that when an organization that is "private" and "voluntary" for some purposes becomes involved in state action, it loses its First Amendment associational rights to the extent that it acts under color of state law.

The District Court held that party members have associational rights which protect them from interference by other individuals and that the State has the power — indeed a virtual duty — to provide "affirmative protection of their associational rights." (Mem. Dec. at App. 6-7, 10-12.) Appellants acknowledge that the associational rights of party members may protect them from some forms of governmental interference. *Cousins v. Wigoda*, 419 U.S. 477 (1975). However, when a State intervenes to protect and to benefit private associations, members of those associations surrender their associational rights to the extent that they enjoy the protections and the benefits conferred by the State. If the combined actions of State and association deprive others of their constitutional rights, the association is subject to the constraints of the Fourteenth Amendment. *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); *see Norwood v. Harrison*, 413 U.S. 455, 470 (1973); Note, "State Action: Theories for Applying Constitutional Restrictions to Private Activity," 74 *Colum. L. Rev.* 656, 659 (1974).

The District Court also failed to distinguish between the associational interests of the political parties and

the governmental interests needed to sustain the statute. When a state intervenes to protect and benefit private associations, it must have a public purpose for doing so. As Mr. Justice Brennan stated in *Elrod v. Burns*, "care must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice [to justify state action]." 45 U.S.L.W. at 5096. This Court has never held that a State's assertion of a vested interest in preserving the existence, influence or composition of the two present political parties is sufficient to overcome fundamental rights of non-members. The Court's decisions upholding statutes which favor the two major parties, or impose burdens on minor parties or independent candidates, have rested on a legitimate governmental interest in maintaining the stability of the selection process, not on the hope of preserving the predominance of the Democrats and Republicans. Thus, the State may attempt to see that general election winners have the support of a majority or near majority of citizens, that factionalism is not rampant, and that campaign financing flows more readily to those whose messages are more likely to be attended. See *Buckley v. Valeo*, *supra*, 424 U.S. at 96; *Storer v. Brown*, *supra*, 415 U.S. at 733-36; *American Party of Texas v. White*, *supra*, 415 U.S. at 781-84; *Bullock v. Carter*, *supra*, 405 U.S. at 145; *Jenness v. Fortson*, *supra*, 403 U.S. at 442. But it may not deny minor parties or independent candidates a realistic opportunity to gain access to the ballot or discriminate against legitimate candidates. *Storer v. Brown*, *supra*, 415 U.S. at 739-40; *Bullock v. Carter*, *supra*, 405 U.S. at 145-47; *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968). Nor may it entrench "one or a few parties to the exclusion of others." *Elrod v. Burns*, *supra*, 45 U.S.L.W. at 5098; *accord*, *Williams v. Rhodes*, *supra*, 393 U.S. at 32.

It is not altogether clear what governmental purpose is served by excluding independents from primary elections. The District Court suggested that the Connecticut statute shielded the parties from "intrusion by those with adverse principles." Such a concept presumes that it is possible to determine what a party's principles are. But the goals and philosophies of the major political parties are kept purposefully vague and indeterminate, in order to attract the widest possible support. Furthermore, the parties make no attempt to screen potential members to ensure that they adhere to the few vague principles that may be identified in party platforms or other documents. Indeed, any registered voter in Connecticut may affiliate with either major party without a test of his loyalty or principles.¹⁴ It is impossible to distinguish between such a voter and an independent voter in terms of his loyalty to the goals and principles pursued by a party. Moreover, the parties stated below that they would welcome plaintiffs to their ranks if they would only undergo "the mechanical process of affiliation." (Def. Parties Mem.

¹⁴ The vagueness of party principles and the heterogeneity of party members also make improbable the District Court's conclusion, derived without apparent factual support, that the "party labels" affixed to candidates by primary elections serve as useful guides to a candidate's positions on issues. Studies of voter behavior suggest that to the extent the party label has ever been used by voters in deciding whom to support, the important factor has been simply that the candidate belongs to the same party as the voter. See Nie, *supra* note 6, at 48. So long as party membership may be required of candidates — a requirement not challenged by plaintiffs in any way — the ability use labels in this manner will remain. Cf. *Ray v. Blair*, 343 U.S. 214 (1952) (loyalty oath for candidate). In addition, studies indicate that fewer voters now rely on party identification as a factor in casting their ballots. See Nie at 55-57.

at 19.) Unfortunately, the process is not "mechanical" for these plaintiffs. Reliance on the fact of party enrollment begs the question of whether or not independents have principles "adverse" to those of party members. If, as this Court has observed, "most voters" enroll with a party in order "to gain a voice in [the] selection process," *Kusper v. Pontikes*, *supra*, 410 U.S. at 58, then party enrollment by itself indicates very little about devotion to the party or constancy in support of its candidates.

With regard to the State's interest in preventing deceptive or fraudulent conduct, it is simply not realistic to fear that independent voters will engage in fraudulent conduct such as "raiding," as the State indeed acknowledges in its statutory scheme. This Court has defined raiding as "the practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results." *Kusper v. Pontikes*, *supra*, 414 U.S. at 59; see *Rosario v. Rockefeller*, *supra*, 410 U.S. at 760. The considerations involved in *Kusper* and *Rosario*, where there was a real possibility that partisans of one major party might attempt to change affiliation to the other, are very different from those involved in this case. Independent voters are least likely of all groups to engage in raiding. By definition, they are not party partisans; thus, they are unlikely to throw away an opportunity to cast an affirmative ballot in order to help one party defeat another.

The State of Connecticut has recognized this fact in its statutory scheme, since it allows independent voters to enroll with a party and to vote in a primary at any time except within 17 days of the primary. By contrast, voters enrolled in one party must wait six months before

they are allowed to vote in another party's primary. Conn. Gen. Stat. §§9-56, 9-59. The District Court held that this 17-day period was designed to deter raiding by independents and was "sufficient to demonstrate that a previously independent voter will not, in voting, engage in disruptive or deceptive conduct." (Mem. Dec. at App. 16.) But a waiting period does not "demonstrate" anything about those made to wait. Its purpose is to make partisans decide the primary in which they want to vote at a time before they can determine whether or not it would be advantageous to raid the other party's primary. See *Rosario v. Rockefeller*, *supra*, 410 U.S. at 760-61. Whereas candidates and issues are apt to be obscure six months before an election, making the planning of a raid more difficult, they are usually clearly defined three weeks before voting occurs. If independents wished to "raid" the parties, it would be easy for them to do so under existing law, for they would only have to swear an allegiance they do not feel — not a formidable hurdle for persons who intend to vote falsely, but an impossible task for persons who are unwilling to simulate political affiliation. It is fair to conclude, therefore, that section 9-431 is not designed to deter raiding by independent voters. Although a State may lawfully impose limited durational requirements to prevent raiding, it may not for the same purpose impose a total bar against participation by independent voters in state-run, state-financed primaries. The District Court's failure to appreciate this distinction is another reason for this Court to note probable jurisdiction.

CONCLUSION

Conn. Gen. Stat. §9-431 denies appellants their fundamental rights by forcing them into a constitutionally impermissible choice. The scope of the voting and associational rights at issue in this case have not been previously considered by this Court in the context presented here. Nonetheless, prior decisions of this Court indicate that the District Court has impermissibly narrowed and undervalued appellants' rights. Accordingly, this Court should set this case for full briefing and argument to review the question presented.

Respectfully submitted,

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October 8, 1976

APPENDIX

July 20, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

.....
NATHRA NADER and
ALBERT C. SNYDER, JR.

vs.

:
:
: CIVIL ACTION
: NO. H-76-20

:
: GLORIA SCHAFFER, Secretary
: of the State of Connecticut;
: DEMOCRATIC PARTY OF THE
: STATE OF CONNECTICUT and
: REPUBLICAN PARTY OF THE
: STATE OF CONNECTICUT
:

JUDGMENT

The above-identified action came on for consideration before a three-judge district court; the Honorable Robert P. Anderson, United States Circuit Judge, and the Honorable T. Emmet Clarie and M. Joseph Blumenfeld, United States District Judges, presiding; and,

This cause having been fully heard and a decision having been rendered denying the Plaintiffs' Motion for Summary Judgment and granting the Defendants' Motion to Dismiss;

It is accordingly ORDERED and ADJUDGED that the Plaintiffs' Complaint be and is hereby dismissed.

Dated at Hartford, Connecticut, this 20th day of July, 1976.

SYLVESTER A. MARKOWSKI
Clerk, United States District Court
By: /s/ William D. Templeton
Deputy-in-Charge

[Filed: July 14, 1976]

* * *
MEMORANDUM OF DECISION

Before: ANDERSON, Circuit Judge, CLARIE, Chief District Judge, and BLUMENFELD, District Judge.

ANDERSON, Circuit Judge:

Plaintiffs, Nathra Nader and Albert C. Snyder, Jr., are residents of Winchester, Connecticut. Each has registered as a voter pursuant to Conn. Gen. Stat. §§9-20 and 9-21. The basis for this action, brought under 42 U.S.C. §1983, with jurisdiction based on 28 U.S.C. §§1343(3) and 1343(4), to redress the alleged deprivation, under color of state statute, of certain voting and associational rights guaranteed by the federal Constitution, is that plaintiffs refuse to enroll in a political party pursuant to Conn. Gen. Stat. §9-56 or 9-59 and are, therefore, prohibited from voting in any party primary elections. Because the complaint seeks an order restraining the enforcement of Conn. Gen. Stat. §9-431 on the grounds of its alleged unconstitutionality, and because the constitutional question raised is not "insubstantial," this three-judge court was convened. 28 U.S.C. §2281; *Goosby v. Osser*, 409 U.S. 512 (1973). Plaintiffs have moved, with supporting affidavits, for summary judgment. Defendants, the Secretary of the State of Connecticut, and the Republican and Democratic Parties of Connecticut, have moved to dismiss the complaint. The motion to dismiss is granted and the motion for summary judgment is denied.

Connecticut Gen. Stat. §9-431 provides in pertinent part:

"Eligibility to vote at primary. No person shall be permitted to vote at a primary of a party

unless he is on the last-completed enrolment list of such party in the municipality or voting district, as the case may be"

Plaintiffs' complaint alleges that the actions of the defendant Secretary of the State¹ and her agents in enforcing §9-431, pursuant to §§9-3, 9-4, 9-5, and 9-439, violate plaintiffs' rights in the following manner: (1) by denying them the right to vote in primary elections while extending this right to enrolled party members, deprives plaintiffs of their Fourteenth Amendment right to equal protection of the law; (2) by compelling them either to enroll in a political party or forego a right to vote in a primary election impermissibly forces plaintiffs to choose between a right to vote, on the one hand, and the right freely to associate for the advancement of political ideas, on the other; the latter includes the right to associate with a particular candidate regardless of the candidate's party affiliation; and (3) infringes plaintiffs' right to vote, as guaranteed by Article I, Section 2, cl. 1 and the Fourteenth and Seventeenth Amendments, by preventing plaintiffs from participating in an "integral part" — the primary elections — "of the process by which their United States Senators and Representatives are chosen."

They allege further that "primary elections . . . constitute an integral part of the process established by the State of Connecticut for selecting individuals who will represent and govern plaintiffs in federal, state and local office," and therefore request an order declaring that §9-431 is unconstitutional insofar as it prohibits them from voting in primary elections; and enjoining the Secretary of the State from enforcing §9-431 so as to prohibit them from so voting.²

Connecticut's Primary Election System

Connecticut law divides potential candidates for office into three categories: those of "major parties," those of "minor parties," and independents or "petitioning parties."³ The candidates of the major and minor parties are afforded spaces on the ballot for the general election; other candidates may have their names appear on the ballot by fulfilling the petition requirements of §§9-453a through 9-453s. Conn. Gen. Stat. §9-379.

Initially, state or district conventions, as the case may be, of a major party "choose a candidate for nomination to each state or district office" through a "challenge primary" system. Conn. Gen. Stat. §9-382. Party candidates for municipal office, members of party town committees, and delegates to party conventions, are chosen in each municipality, according to rules prescribed by the party, either by a party caucus, a party convention, or the town committee. Conn. Gen. Stat. §9-390. If the candidate so chosen is not opposed, he becomes the party's candidate in the general election, and no primary election is held. Conn. Gen. Stat. §§9-408 and 9-409. A non-endorsed candidate, however, may force a primary if he meets the three criteria specified in Conn. Gen. Stat. §9-400, which are that he must (1) have received at least twenty percent of the votes of the delegates to the party convention present and voting on any roll call; (2) deposit with the Secretary of the State a sum of money equal to five percent of the salary of the office he seeks; and (3) file with the Secretary of the State a petition bearing signatures of a certain number of enrolled party members residing in the jurisdiction under contest, as specified by §9-400. (For example, a challenger for a statewide office

would require 5000 signatures; a challenger for a congressional district office would require 2000 signatures.) It should be noted that plaintiffs seek to participate only in this last step of the nominating process, *i.e.*, the primary election to choose candidates for public offices; they do not seek to participate in party caucuses or conventions, or in the selection of town committee members or convention delegates.

Minor parties are required only to nominate their candidates in a manner prescribed in the party's own rules, which must be filed with the Secretary of the State. Conn. Gen. Stat. §9-451. Candidates not nominated by either a major or minor party can get on the ballot by presenting to the Secretary of the State a petition bearing signatures equal to one percent of the votes cast for the same office at the last preceding election. Conn. Gen. Stat. §9-453d.

Enrollment in a political party is, as plaintiffs assert, a public act of affiliation with the party, at least insofar as the voter is required by Conn. Gen. Stat. §9-56 to appear before the registrar of voters, approximately eighteen days before the election, and execute a form giving his name, address, desired party affiliation, any affiliations or requests for affiliations (enrollments) with other parties within the previous six months and the date on which any application had been made for erasure from enrollment in any party, Conn. Gen. Stat. §9-56; and the enrollment lists are public records, Conn. Gen. Stat. §9-55. An unaffiliated voter may enroll in a party and participate in a primary election as late as the third Saturday before its occurrence. Conn. Gen. Stat. §9-56. A voter who is enrolled in a party may at any time apply for erasure from that party's enrollment

list, and for transfer to the enrollment list of another party, but he may not vote in any primary for six months following the date of the application for transfer. Conn. Gen. Stat. §9-59.

DISCUSSION

Plaintiffs' principal argument⁴ is that participation in a primary election is an exercise of the constitutionally protected right to vote and of the constitutionally protected right to associate with others in support of a candidate. They also assert that to the latter there is a constitutionally protected correlative right *not* to associate, and to be free from coerced association. They further claim a constitutionally protected right of privacy of association. Plaintiffs wish to exercise both of these claimed sets of rights, but §9-431 limits them to one or the other; that is, in order to vote in a party's primary election, plaintiffs must enroll in the party, while on the other hand, if they maintain their stand against enrollment, they are precluded.

The fact that plaintiffs do not enroll in the Democratic or Republican Parties does not prevent them from working in support of or contributing money to their favorite candidates within these Parties or candidates in other major or minor parties; or from giving such support to independent candidates, including themselves. Moreover the plaintiffs are not prevented from signing the petitions of independents or participating in a minor party's candidate selection process as it is established by the party's rules under §9-451. Connecticut's voting laws clearly provide avenues for supporting candidates of one's persuasion without affiliating with an established "major" political party.

Plaintiffs argue that the alternative avenues of political activity open to them under Connecticut law are ineffectual and unrealistic, since in most general elections, only the Democratic and Republican nominees have reasonable probabilities of success. While plaintiffs' contention may generally hold true for national and many statewide elections, both minor party and independent candidates may reasonably anticipate a measure of success in local elections.⁵ In any event, any dominant position enjoyed by the Democratic and Republican Parties is not the result of improper support, or discrimination in their favor, by the State. Rather, the two Parties enjoy this position because, over a period of time, they have been successful in attracting the bulk of the electorate, so that they now have substantial followings.

A "major party" embraces a substantial fraction of the total electorate, who have associated together for the purpose of nominating and working for the election of candidates who, as officeholders, will implement the members' political views. "Success" in this endeavor, such as the major parties have achieved, is the ultimate goal of the members' political activities, and does not necessarily call for strict constitutional scrutiny by the judiciary so as to increase the political strength of those who have not actively attempted to advance their political views.

Improper State support for the Democratic and Republican Parties cannot be inferred from the fact that their primary elections are closely regulated by statute. In the past, many political nominations were made by a process which both the plaintiffs and *amicus curiae*⁶ briefs have described as the "smoke-filled room." Many states, such as Connecticut, have enacted statutes calling

for nomination by primary election, presumably because they find it beneficial to allow the general party membership a voice in the nominating process. See *Bullock v. Carter*, 405 U.S. 134, 148 (1972). The states also recognize the frequency of electoral success achieved by the Democratic and Republican Parties, and the desirability of having a regularized system for making these Parties' nominations, which are so important to the ultimate selection of governmental leaders. Each state legislature chooses the primary election scheme that it thinks will best promote democratic, electoral and governmental goals. In Connecticut, major party primaries are the subject of detailed regulation, while the nominating processes of minor and petitioning parties are more loosely controlled; this reflects the fact that the State is particularly concerned with the parties which have demonstrated some probability of success in the general election and whose candidates may become holders of public office. Cf. *Buckley v. Valeo*, U.S. , , 44 U.S.L.W. 4127, 4155 (U.S., Jan. 30, 1976), and *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (legislature can require candidate to demonstrate a "significant modicum of support" before, respectively, distributing public funds to him, or placing his name on the ballot).

Further there is at least plurality in Connecticut — it is not a "one-party" state — and thus no one party's primary election is completely determinative of the outcome. Compare *United States v. Classic*, 313 U.S. 299 (1941).

With regard to the claimed right not to associate, it is true that, in order to vote in a party's primary, plaintiffs must publicly affiliate with that party. But enrollment in Connecticut imposes absolutely no affirmative party obligations on the voter, in terms of time or money, and it

does not even obligate him to vote for the party's positions or candidates or to vote at all. The voter's name, however, may be erased from the party's enrollment list on a proper showing that he does not support the party's principles or candidates. Conn. Gen. Stat. §§9-60, 9-61; but in actual practice these statutes are not used. Such limited public affiliation is simply not comparable to the coerced orthodoxy imposed by government officials in the cases cited by plaintiffs, such as *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); and *Russo v. Central School District No. 1*, 469 F.2d 623 (2 Cir. 1972), *cert. denied*, 411 U.S. 932 (1973). (Even if it is assumed that some affiliation is "coerced" by §9-431, the voter at least may choose his party, whereas in the cases just listed there was no such choice.)

Plaintiffs also claim that the public nature of enrollment violates their right to privacy of association by potentially subjecting them to harassment because of their affiliations with a party. It is insufficient, however, for plaintiffs merely to raise the spectre of harassment; instead, they must make a detailed factual showing of actual threats or incidents of harassment. Compare *Buckley v. Valeo*, *supra*, 44 U.S.L.W. at 4147-48 with *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Cf. *Doe v. Martin*, 404 F. Supp. 753 (D.D.C. 1975) (three-judge court); *Laird v. Tatum*, 408 U.S. 1 (1972) (allegations of subjective "chill" are not an adequate substitute for a claim of presently existing, specific harm or a threat of specific future harm to plaintiff, so as to create a case or controversy in suit challenging Army's intelligence-gathering activities). At least one form of potential harassment suggested by plaintiffs — loss of civil service employment due to political affiliation — cannot necessarily be considered a realistic

threat since this practice was recently declared unconstitutional by the Supreme Court, as least as to patronage employees in non-policymaking positions. *Elrod v. Burns*, U.S. , 44 U.S.L.W. 5091 (U.S., June 28, 1976).

The State, plaintiffs assert, may not force them to comply with §9-431 unless the State establishes that it "serves a compelling state interest by the least drastic means available," citing *Dunn v. Blumstein*, 405 U.S. 330 (1972), and that "No state interest served by Conn. Gen. Stat. §9-431 is sufficiently compelling to justify depriving plaintiffs of their constitutional rights."

A political party, however, is a voluntary association, instituted for political purposes, with the goal of effectuating the will of its members. *Ray v. Blair*, 343 U.S. 214, 222 n. 9 (1952); *Alcorn ex rel. Dawson v. Gleason*, 10 Conn. Supp. 210, 217 (Hartford County Court of Common Pleas 1941); see also *Fields v. Osborne*, 21 A. 1070, 1071, 60 Conn. 544 (1891). The party's ultimate goal, in the electoral process, is to obtain control of the levers of government by winning elections, so that it may then put into operation its policies and philosophies. See *Ripon Society v. National Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc); Comment, 40 U. CHI. L. REV. 636, 654 (1973); Note, 27 RUTGERS L. REV. 298, 303-05 (1974). Plaintiffs agree with this description of political parties; they state that it is a function of parties "to form coalitions of interest groups, providing their members access to power and facilitating the passage of legislation once a party has achieved office." In order to accomplish this goal, the party seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its

members') policies and philosophies. The party's selection of its candidates therefore is an ultimate and crucial element of the party members' political activities.

Because the political party is formed for the purpose of engaging in political activities, constitutionally protected associational rights of its members are vitally essential to the candidate selection process. *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *O'Brien v. Brown*, 409 U.S. 1, 4 (1972) (per curiam); *Ripon Society v. National Republican Party*, *supra*; Note 27 RUTGERS L. REV. 298 (1974). The *Ripon Society* case notes that party members also have a "right to organize a party in the way that will make it the most effective political organization," 525 F.2d at 586. An attempt to interfere with a party's ability so to maintain itself is simultaneously an interference with the associational rights of its members, *id.* at 585; see also *Buckley v. Valeo*, *supra*, 44 U.S.L.W. at 4133, and *Cousins v. Wigoda*, *supra*, 419 U.S. at 487-88, all of which cite *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion). The rights of party members may to some extent offset the importance of claimed conflicting rights asserted by persons challenging some aspect of the candidate selection process. 525 F.2d at 588; see also *Cousins v. Wigoda*, *supra*, 419 U.S. at 487. More importantly, party members are entitled to affirmative protection of their associational rights, see Note, 27 RUTGERS L. REV. 298 (1974). A party, were it a completely private organization with no government regulation, could limit participation in its nominating process to party members. In the regulated situation, the state has a legitimate interest in protecting party members' associational rights, by legislating to protect the party "from intrusion by those with adverse political principles."

Ray v. Blair, *supra*, 343 U.S. at 221-22; see also *Lippitt v. Cipollone*, 337 F. Supp. 1405, 1406 (N.D. Ohio 1971) (three-judge court) (per curiam), *aff'd mem.*, 404 U.S. 1032 (1972); *Green v. State of Texas*, 351 F. Supp. 143, 145 (N.D. Tex. 1972) (three-judge court) (per curiam).

In addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process. This includes preserving parties as viable and identifiable interest groups; insuring that the results of primary elections, in a broad sense, accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes which will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies; and preventing fraudulent and deceptive conduct which mars the nominating process. See generally Note, 27 RUTGERS L. REV. 298 (1974), and Comment, 40 U. CHI. L. REV. 636 (1973). The Supreme Court has recognized the legitimacy of this state interest in decisions such as *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Storer v. Brown*, 415 U.S. 724 (1974); and *American Party of Texas v. White*, 415 U.S. 767 (1974).

These well established principles are applicable here. *Ray v. Blair*, *supra*, involved an Alabama primary election system regulated by state statute and carried out at state expense. State party executive committees were given the power to fix political or other qualifications of party members and candidates. The Democratic Party required candidates for Party nomination to sign a pledge stating they would aid and support the Party's ultimate nominees. This was challenged on equal protection, due process, and

other constitutional grounds, but the Supreme Court upheld the pledge requirement and stated that it "protect[ed] a party from intrusion by those with adverse political principles," 343 U.S. at 221-22, and that "A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy and leadership of that party," *id.* at 227. In specifically disposing of the equal protection and due process claims, the Court stated, *id.* at 226 n. 14:

"[T]he requirement of this pledge, unlike the requirement of color, is reasonably related to a legitimate legislative objective — namely, to protect the party system by protecting the party from a fraudulent invasion by candidates who will not support the party In facilitating the effective operation of democratic government, a state might reasonably classify voters or candidates according to party affiliations This requirement of a pledge does not deny equal protection or due process."

Although, as plaintiffs note, *Ray v. Blair*, involved a party loyalty oath for *candidates* for party office, not one for *voters* in a party election, but the language and reasoning of the Court's opinion imply the validity of a similar requirement, binding members of a party to vote only for a party member as the party's candidate, to run in the ensuing national, state, county or municipal election. Any elector in Connecticut may, however, in the subsequent general election vote for any party's candidate or an independent, as he chooses, and there is no way to compel him to disclose for whom he voted.

Relying on *Ray v. Blair*, a three-judge court in *Lippitt v. Cipollone*, *supra*, 337 F.Supp. at 1406, upheld Ohio statutes designed to prevent raiding of one party by members of another party, and to preclude candidates from altering their political party affiliations for opportunistic reasons. The court stated that the protection of parties (within their respective party organizations) from intrusion by those with adverse political principles was a legitimate legislative goal.

The Supreme Court ruled in *Storer v. Brown*, *supra*, that California could bar from the ballot an independent candidate who within the previous year had been a member of a party; this law did not discriminate against such independent candidates, because candidates for party nomination were similarly disqualified if they belonged to a different party within the previous year. 415 U.S. at 733-34. In both *Storer*, 415 U.S. at 740-41, and *American Party of Texas v. White*, *supra*, 415 U.S. 767, the Court upheld state laws which barred voters who had already participated in a party's nominating process from signing the nominating petitions of other parties.

A three-judge court in *Green v. State of Texas*, *supra*, at 145, held constitutional certain sections of the Texas Election Code which "prohibit electors who vote for a candidate for one office in a particular party primary from voting in another party primary for a candidate running for a different office." The court stated:

"Far from abridging federal rights, the Texas statutes here under review serve to protect the political rights of Texans to join political parties and to enjoy the free right of association appurtenant thereto with some protection against

raids and interference from independents or members of other political parties."

In *Rosario v. Rockefeller*, *supra*, the Supreme Court upheld New York's "delayed enrollment" scheme which barred voters from participation in a primary election unless they were enrolled in the party prior to the preceding general election — a requirement which resulted, in practice, in "waiting periods" of up to eleven months. Affirming a decision of the Second Circuit, 458 F.2d 649 (1972), the Court ruled that this scheme was properly tailored to prevent "raiding," a practice "whereby voters in sympathy with one party [7] designate themselves as voters of another party so as to influence or determine the results of the other party's primary," 410 U.S.C. at 760. The scheme, therefore, was tied to the "legitimate and valid state goal" of "preservation of the integrity of the electoral process." *Id.* at 761.

As we have noted, the phrase "preservation of the integrity of the electoral process" contemplates, in the nominating context, the assurance that primary election results reflect the will of party members, undistorted by the votes of those unconcerned with, if not actually hostile to, the principles, philosophies, and goals of the party. The phrase contemplates the prevention of fraud in the nominating process, and a candidacy determined by the votes of non-party members is arguably a fraudulent candidacy. See *Rosario v. Rockefeller*, 458 F.2d 649, 652 (2 Cir. 1972), *aff'd*, 410 U.S. 752 (1973).

It is clear from these cases that, in order to protect party members from "intrusion by those with adverse political principles," and to preserve the integrity of the electoral process, a state legitimately may condition one's

participation in a party's *nominating* process on some showing of loyalty to that party, and that is precisely what Connecticut does in §9-431. The enrollment process of §9-56 is not particularly burdensome, and it is a minimal demonstration by the voter that he has some "commitment" to the party in whose primary he wishes to participate. It does not constitute anything in the nature of an absolute barrier to voting in a primary election because it is beyond the capabilities or powers of an elector to perform as was the case in *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year residency requirement), and *Smith v. Allwright*, 321 U.S. 649 (1944) (blacks barred from participation in primary elections). Compare *Rosario v. Rockefeller*, 410 U.S. 752 (1973). And if plaintiffs choose not to associate, by not enrolling in a party, their right to vote in the *general* election is unaffected. Cf. *Ripon Society v. National Republican Party*, *supra*, at 586, 588-89.

Plaintiffs argue that §9-431 does not accomplish legitimate state goals because the "waiting period" for persons who are independent voters, is less than three weeks, and this is an insufficient period to deter fraudulent or deceptive conduct by those planning it. But this argument goes only to the length of the waiting period, and not to the method used. The Connecticut legislature has determined that enrollment approximately three weeks before the primary election is sufficient to demonstrate that a previously independent voter will not, in voting, engage in disruptive or deceptive conduct inconsistent with the associational rights of other party members and the preservation of the integrity of the nominating process. The legislature has, with some logic, imposed a longer waiting period on voters previously enrolled in

other parties, as they are perhaps more likely to have a hostile motivation. We fail to see how plaintiffs' position gains any support from the Connecticut legislature's decision not to impose the maximum waiting periods permitted by the Constitution.

Plaintiffs' claim that Connecticut could prevent raiding and other distortive and deceptive conduct by a less drastic means, namely, criminal sanctions against the perpetrators, is not persuasive. Assuming *arguendo* that the "least drastic means" test applies here, that standard does not require the State to choose ineffectual means to accomplish its goals. *Storer v. Brown*, *supra*, 415 U.S. at 736. *Rosario v. Rockefeller*, *supra*, 410 U.S. at 762 n. 10. Although criminal sanctions might be effective to punish the ringleaders of any raiding episode, it would be very difficult to detect and punish all the individual voters who engaged in the proscribed conduct, particularly given the secrecy of the ballot and the difficult specific intent issues which would be involved. See Note, 27 RUTGERS L. REV. 298, 311 (1974). Unless the deterrent aspect of the criminal law were totally effective, such a law would apply only after the damage had been done to the electoral process and would be in the nature of punishment *not* remedy.

The State obviously cannot conduct a test on each voter to determine his political ideas before allowing him to vote in a primary election, and the enrollment requirement of §9-431 is a constitutionally acceptable surrogate. And given the State's legitimate interest in legislating to protect the associational rights of party members, which rights include the right to put forward candidates who adhere to and symbolize the party's views, §9-431 recognizes the simple fact that, "No matter how loyal the

nominee, if he is chosen by those not in sympathy with the party, he is not that party's nominee." Note, 27 RUTGERS L. REV. 298, 311 n. 106 (1974). Cf. *Bendinger v. Ogilvie*, 335 F. Supp. 572, 576-77 (N.D. Ill. 1971) (three-judge court).

From the party's point of view, enrollment also serves an important housekeeping function. Candidates need to know who is in the electorate, so that they (the candidates) can attempt to persuade those individuals to vote for them. Party members who wish to establish, as party policy, a particular course of conduct through the election of a particular candidate, similarly need to know who their supporters are. It is common experience that direct solicitation of party members — by mail, telephone, or face-to-face contact, and by the candidates themselves or by their active supporters — is part of any primary election campaign. But, without the public list of party members which is provided by the enrollment process, such electioneering would become quite difficult. The enrollment requirement of §9-431, coupled with the three-week waiting period of §9-456, allows compilation of a list — at the start of the final, crucial weeks of campaigning — of the concerned electorate.

Plaintiffs also argue that §9-431 deprives them of the equal protection of the laws by denying to them the right to participate in elections in which they are "interested" and by which they are "affected," to the same extent as those persons who *may* vote, solely because plaintiffs do not enroll in political parties. Authority cited in support of this argument includes *Hill v. Stone*, 421 U.S. 289, 295-98 (1975); *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 207-13 (1970); *Cipriano v. City of*

Houma, 395 U.S. 701, 706 (1969) (per curiam); and *Kramer v. Union Free School District*, 395 U.S. 621, 632-33 (1969). Although plaintiffs are "interested" in and "affected" by the ultimate selection of their governmental leaders, they are *not* "interested" in primary elections in the crucial, distinguishing aspect that party members are interested. Namely, plaintiffs are *not* "interested" in nominating the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies. Plaintiffs' refusal to join any of these voluntary associations, which are organized for the purpose of effectuating their members' political goals, is fundamentally inconsistent with any claim that plaintiffs are as "interested" as party members in the outcome of the party nominating process. The constitutional validity of this distinction between enrolled party members and all other voters, on which §9-431 is based, is at least implicit in the Supreme Court's flat statement in *Ray v. Blair*, *supra*, that "a state might reasonably classify voters or candidates according to party affiliations." Section 9-431, therefore, does not make an "invidious discrimination" which would offend the Constitution, *American Party of Texas v. White*, *supra*, 415 U.S. at 781; *Jenness v. Fortson*, 403 U.S. 431 (1971); *Lippitt v. Cipollone*, *supra*, 337 F. Supp. at 1406. Cf. *Pirincin v. Board of Elections of Cuyahoga County*, 368 F. Supp. 64, 70 (N.D. Ohio) (three-judge court), *aff'd mem.*, 414 U.S. 990 (1973):

"[T]o the extent Ohio's election laws limit the right to participate in a party primary or be a candidate for political office, a person is excluded by reasonable restriction but not by a political caste system. There can be no discrimination of

constitutional proportion when a man refrains from entering a party primary of one of the two major political parties because he regards himself an independent or a member of a minority party."

"Not every limitation or incidental burden on the exercise of voting rights is subject to a strict standard of review." *Bullock v. Carter*, 405 U.S. 134, 143 (1972), citing *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969). Similarly, a state statute or policy must cause more than a minimal infringement of First Amendment rights before a state is called upon to provide a "compelling interest" justification. See, e.g., *Connecticut State Federation of Teachers v. Board of Education Members*, ___ F.2d ___ (No. 75-7436, 2 Cir., May 21, 1976), and authorities cited therein. In *Storer v. Brown*, *supra*, 415 U.S. at 729, the Supreme Court stated:

"[A]ppellants . . . assert that under [certain Court decisions], *substantial* burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest It has never been suggested that [the rule of these decisions] automatically invalidates every *substantial* restriction on the right to vote or to associate." (Emphasis supplied.)

There must be more than a minimal infringement on the rights to vote and of association, therefore, before strict

judicial review is warranted. See *Buckley v. Valeo*, *supra*, and *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 567 (1973) ("neither the right to associate nor the right to participate in political activities is absolute"); *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) ("a *significant* encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest") (emphasis added).

We, therefore, conclude that §9-431 is reasonably related to the accomplishment of legitimate state goals. *Rosario v. Rockefeller*, *supra*, 410 U.S. at 762.

Plaintiffs, in their argument, have pointed to several perceived flaws in the primary election system which the Connecticut legislature has established. It is asserted, for example, that, "There are, moreover, reasons to believe that if independent voters were able to vote in primary elections, the stability of the political system would actually be enhanced"; and that participation by independent voters in primary elections "will benefit the two-party system by drawing more citizens into the political process at this crucial stage." They also argue that it is "irrational" for the legislature "to presume" that "independent voters are at all likely to engage in raiding," and, as discussed *supra*, that §9-56 is an ineffective device to bar deceptive conduct by those independents who wish to engage in it. The Secretary of the State, meanwhile, in her argument, has pointed out that, should plaintiffs prevail here, Connecticut would be forced to choose among a number of other types of primary systems, e.g., the "crossover" primary, the "blanket" primary, or the "multiple vote" primary. The amicus curiae brief states that

"... a major factor in the increase in proportion of unaffiliated voters is the discontent and dissatisfaction of large numbers of citizens with the political parties . . . ,"

and that excluding independent voters from participation in primary elections serves to increase the feeling of these citizens that they are excluded from an important part of the political process. The amicus brief declares that §9-431 actually "hinders the operation of the democratic process in an enlightened society such as we enjoy in the State of Connecticut," and asserts that "[n]o political party can derive real strength" from this statute which "compels citizens to affiliate in order to exercise their constitutional rights."

The comparative merits of various forms of primary election systems have been widely debated in this presidential election year. In particular, the "open" and "crossover" primaries, which permit independents and/or members of other parties to participate in a given party's primary, have been the subject of controversy.⁸

A state may legislate to prevent the perceived evils of crossover voting, e.g., *Rosario v. Rockefeller, supra*, but several states permit crossover voting in their primaries. Others have provision for primaries which allow participation by independents and members of other parties. There is no suggestion that such a clause makes the election laws unconstitutional, nor is it a mandatory prerequisite to constitutionality that independent, non-member electors be permitted to vote in a party's primary. The Connecticut General Assembly has adopted statutes governing political party primaries which it considers best meet the needs of the State. The laws are not invidiously

discriminatory but apply to all alike. The legislatures of "[t]he states have broad discretion in formulating election policies." *Tansley v. Grasso*, 315 F. Supp. 513, 519 (D. Conn. 1970) (three-judge court), citing *Williams v. Rhodes*, 393 U.S. 23, 34 (1968); *United States v. Classic*, 313 U.S. 299, 311 (1941); and *Voorhes v. Dempsey*, 231 F. Supp. 975, 977 (D. Conn. 1964) (three-judge court) (per curiam), *aff'd mem.*, 379 U.S. 648 (1965). Accord, *Bullock v. Carter, supra*, 405 U.S. at 141; see also *Storer v. Brown, supra*, 415 U.S. at 729-30 and 736.

We, therefore, hold that the election laws of the General Statutes of the State of Connecticut, governing primaries are not in violation of the Constitution of the United States, that they provide for legitimate goals through constitutionally permissible means and that there is no need or occasion for the judicial relief requested by the plaintiffs.

The record does not disclose that the plaintiffs at any time have sought to have the primary election statutes changed to conform more closely to their views. The laws, as they are now, are not immutable; and, if the plaintiffs, as they imply, are speaking for a generous one-third of the entire electorate of the State of Connecticut, they should, by using the simple and direct means provided by §§9-453a-453s, be able to get one or more of their number on the ballots and, through diligent and thorough campaigning, elect one or more representatives in the legislature. Theoretically the laws are still made by the legislatures and, although the effort to achieve a change in the statutes requires a great deal of time, hard work and infinite patience, it is not impossible. The presently popular course of raising a federal constitutional question and seeking a change in the law by judicial fiat, is quicker,

more academically attractive and perhaps more thorough. But such action tends in itself to work in derogation of the separation of powers and our democratic system of government. The courts should not use this power for the purpose of exercising "some amorphous general supervision of the operations of government," *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring), but only to redress violations of basic human rights to which federal constitutional protections have been extended or to correct governmental action which otherwise conflicts with express provisions of the Constitution. The plaintiffs' case does not fall within these designations.

The defendants' motion to dismiss is granted and the plaintiffs' motion for summary judgment is denied. Judgment may enter accordingly.

Dated at Hartford, Connecticut, this 14th day of July, A.D. 1976.

/s/ Robert P. Anderson
United States Circuit Judge
/s/ T. Emmet Clarie
Chief United States District
Judge
/s/ M. Joseph Blumenfeld
United States District Judge

Footnotes:

1. Plaintiffs' original complaint, filed January 15, 1976, named only Secretary of the State Schaffer as a defendant. Subsequently, after a "Motion by Defendant to Bring in Additional Defendants," the Republican and Democratic Parties of Connecticut were added as defendants.

2. The request for certification of this case as a class action, with the class comprised of "all those registered voters of the State of

Connecticut who are not enrolled in any political party and who are therefore barred from voting in primary elections," was withdrawn because counsel for the Secretary of the State stipulated at the hearing on the merits that this court's ruling on the validity of §9-431 would not be limited to plaintiffs Nader and Snyder but would be given statewide application.

3. A "major party" is one (a) whose candidate in the last preceding gubernatorial election received at least twenty percent of the total votes for that office; or (b) whose candidate for the office in question received, at the last preceding regular election for that office, at least ten percent of the total votes. Conn. Gen. Stat. §9-372(e). A "minor party" is one whose gubernatorial candidate received less than twenty percent of the total vote in the last preceding election; and whose candidate for the office in question received less than ten percent but at least one percent of the total vote for that office in the past preceding election. Conn. Gen. Stat. §9-372(f). Independents or "petitioning parties" are candidates or parties who have qualified for nomination for elective office pursuant to the provisions of §§9-453(a) through 9-453(s), inclusive, or in instances of nominations for vacancy elections for the offices of state senator or state representative, as provided in §9-216.

4. We agree at the outset with plaintiffs, that constitutional standards must be satisfied in primary as well as in general elections, *Smith v. Allwright*, 321 U.S. 649, 661 (1944); cf. *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969); and that the Secretary of the State's actions which are complained of are taken under color of state law for purposes of 42 U.S.C. §1983, *Bullock v. Carter*, 405 U.S. 134, 140 (1972); *Gray v. Sanders*, 372 U.S. 368, 374-75 (1963); *State of Georgia v. National Democratic Party*, 447 F.2d 1271, 1276 (D.C. Cir.), cert. denied, 404 U.S. 858 (1971).

Although plaintiffs cite several cases for the proposition that there is a "right" to vote in primary elections, these cases do not hold that there is a right to vote in primary elections even though the voter refuses to comply with constitutionally legitimate rules and requirements of party membership. Indeed, the leading case of *Smith v. Allwright*, *supra*, involved a primary election system, established by state statute, under which party membership was

"the essential qualification for voting in a primary to select nominees for a general election," *id.* at 664. The petitioner there did not question the party membership requirement, but successfully challenged as unconstitutional his exclusion from Democratic Party membership on the basis of race. It must be presumed that the petitioner was ready, willing, and able to satisfy all other prerequisites for party membership (see 131 F.2d 593, 594 (5 Cir. 1943) (per curiam)), which included a party loyalty oath, 321 U.S. at 653-54 n. 6, because, had he not satisfied all other valid party membership requirements, he would have lacked standing to raise the racial issue. Cf. *Storer v. Brown*, 415 U.S. 724, 736-37 (1974); *Clark v. Rose*, 531 F.2d 56, 58 (2 Cir. 1976) (per curiam).

5. In terms of the ease of access to the ballot which the Connecticut statutes provide for parties other than the Republican and Democratic Parties, and persons who are not candidates of those Parties, it is interesting to note that, in the 1970, 1972, and 1974 elections, a total of nine candidates who were neither Republican nor Democratic achieved "major party" status. Further, from 1966 through 1974, a total of sixty candidacies achieved "minor party" status. And from 1966 through 1975, a total of 969 candidates gathered a number of petition signatures sufficient under §9-543d to entitle them to be placed on the ballot for the general election.

6. On June 22, 1976 this court granted United States Senator Lowell P. Weicker, Jr.'s motion for leave to file an *amicus curiae* brief.

7. The Court did *not* say, "voters who are *members* of one party" It thus left open the possibility that independent voters, as well as members of other parties, could be guilty of "raiding." But see *Echevarria v. Carey*, 402 F. Supp. 183, 188 (S.D.N.Y. 1975).

8. See, e.g., Editorial, "Adulterated Choice," *New York Times*, May 25, 1976, at 34, col. 1; M.S. Forbes, Jr., "Wallacites and the GOP," *Forbes*, June 1, 1976, at 19; Barone, "That 'Crossover' Nonsense," *Washington Post*, May 16, 1976, at C-7; Herbers, "Cross-over Voting Makes Primaries More General," *New York Times*, May 16, 1976, §IV, at 2; Rovere, "Letter From Washington," *The New Yorker*, June 21, 1976, at 90-91. See generally Note, 27 RUTGERS L. REV. 298 (1974), and Comment, 40 U. CHI. L. REV. 636 (1973).

[Filed: August 13, 1976]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

[Caption]

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Nathra Nader and Albert C. Snyder, Jr., appeal to the Supreme Court of the United States from the judgment of the three-judge court entered in this action on July 20, 1976. The court denied plaintiffs' motion for summary judgment, thereby denying plaintiffs a permanent injunction against the enforcement of Conn. Gen. Stat. §9-431, and granted defendants' motion to dismiss. Appeal is taken pursuant to 28 U.S.C. §1253.

Dated: Washington, D.C.
August 13, 1976

Respectfully submitted,

/s/ William Clendenen

William Clendenen

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310-11
New Haven, Connecticut
06510

/s/ Linda F. Donaldson

Linda F. Donaldson

/s/ Alan B. Morrison (by L.F.D.)

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Attorneys for Plaintiffs

[Filed: May 6, 1976]

* * * * *

AFFIDAVIT OF NATHRA NADER

NATHRA NADER, being duly sworn, hereby deposes and says:

1. I, Nathra Nader, am a citizen of the United States and a bona fide resident of the Township of Winchester, Connecticut. I am presently registered to vote in Winchester and have been so registered for over fifty years.

2. I have in the past voted in Winchester in federal, state and local general elections.

3. I am not now and have never been enrolled as a member of any political party, including the two major political parties who are defendants in this case. I refuse as a matter of principle to join either of the major political parties or any other political party. Such affiliation would be contrary to my beliefs, particularly in view of the fact that a record of my affiliation would be public under Connecticut law.

4. By virtue of the fact that I have refused to enrol in a political party, I have in the past been denied the right to vote in those primary elections in the State of Connecticut in which candidates for public office are nominated. I have therefore been unable to vote for certain candidates whom I preferred to the candidates eventually selected as nominees for public office. I would like to vote in those primary elections and thereby to support candidates of my choice.

5. I believe that it is my right as an American citizen to participate equally with other citizens in the selection of the officials who will govern or represent me in public

office and that I should not be denied that right because others choose to join a political party and I do not.

/s/ Nathra Nader

Nathra Nader

[Notary Seal]

[Filed: May 6, 1976]

* * * * *

AFFIDAVIT OF ALBERT C. SNYDER, JR.

ALBERT C. SNYDER, JR., being duly sworn, hereby deposes and says:

1. I, Albert C. Snyder, Jr., am a citizen of the United States and a bona fide resident of the Township of Winchester, Connecticut. I am presently registered to vote in Winchester.

2. I first registered to vote in 1945 in Bloomfield, Connecticut. Between 1945 and 1974, I changed my town of residence several times, but always lived within the State of Connecticut. In 1974, I moved to Winchester. In all of these towns, I have voted in federal, state and local general elections.

3. In each of the towns where I lived between 1945 and 1974, I enrolled as a member of the Republican Party. I enrolled as a Republican because that party was the predominant party in each of the towns where I lived, and because the candidates of the Republican Party best represented my views on issues during those years.

4. In 1974, when I moved to Winchester, I decided to become an independent voter and did not enrol with a party. I refused to enrol because I had become convinced that there is no difference between the Republican and

Democratic Parties. The Watergate episode also convinced me that our present political system makes candidates so dependent on their party's support for assurance of election or re-election that they become unwilling to be honest or to take independent stands on issues. I did not want to be a member of a party under these circumstances.

5. I believe that under the present system, I am given little real choice between candidates when I vote in a general election. The percentage of registered voters who do not vote on election day convinces me that other voters also feel they have no choice.

6. Because I am not enrolled in a party, I am now denied the right to vote in those primary elections in the State of Connecticut in which candidates for public office are nominated. I am therefore unable to support fully certain candidates whom I prefer, but who may suffer defeat in the primary election. I would like to vote in those primary elections and thereby to support candidates of my choice.

7. I believe that it is my right as an American citizen to participate equally with other citizens in the selection of the officials who will govern or represent me in public office and that I should not be denied that right because others choose to join a political party and I do not.

/s/ Albert C. Snyder, Jr.

Albert C. Snyder, Jr.

[Notary Seal]